

probate of such an instrument which is effectual as to personalty is by no means conclusive as to the realty; and the tribunal before which it is directed to be brought for probate, although clothed with a limited power as to personal property has no sort of jurisdiction in relation to titles to real estates.

Hence, although a will, if it were like an ordinary deed of gift, which conveyed property to no more than one person, might with propriety be entrusted to the custody of the donee alone; yet it is sufficiently obvious, from the various and rival interests which almost always arise among those who claim under a will, as well as between them and the representatives of the deceased as on his intestacy, that there ought to be some legal place of common deposit where it may be safely kept for the benefit of all concerned; and that there should also be some mode of having it finally and conclusively authenticated as well in regard to the real as the personal estate.

In England it is the duty of an executor to have the will proved before the Ecclesiastical Court, either in common form, by his own oath, or by the testimony of witnesses; in case its validity should be disputed. When it has been proved, the original is deposited in the registry, and a copy thereof is made out under the seal of the Court, and delivered to the executor, with a certificate of its having been so proved, all which together is usually styled the probate. 2 *Blac. Com.* 508. *The probate by witnesses in the Ecclesiastical Court is conclusive as to the personal estate; *Toller Executors*, 77; but it does not in any degree authenticate the will in so far as it may have made any disposition of real estate; and, consequently, if its validity be questioned as to that, it will be necessary to prove it as fully as if nothing had previously been done. It is a privilege of the heir to have an issue *devisavit vel non* to try the validity of a will; but this privilege may be rejected, as the Chancellor is not obliged, in any case, to send out an issue. *Tucker v. Sanger*, 6 *Exch. Rep.* 49; *Attorney-General v. Burridge*, 6 *Exch. Rep.* 358. **480**

But the Ecclesiastical Court having obtained legal possession of the will, and having become pledged for its safety, in respect to the personal estate, of which it had made some disposition, that Court cannot, therefore, allow it to be delivered exclusively into the hands of any one who may claim under it, lest the interests of others might be put in peril; and yet, as regards the realty, it cannot be legally proved unless the original itself be brought before the Court and jury, who alone are competent to determine its validity. To remove this difficulty and to prevent injustice, the Court of Chancery has assumed a jurisdiction, upon petition, to order the original will to be delivered by the register of the Ecclesiastical Court to the petitioner, on his giving bond for its safe return, for the purpose of its being brought before the proper tri-